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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-158

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

CLYDE H. DUNCAN,
Respondent.

REPLY OF PETITIONER

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Respondent mistakenly postulates his answers on the theory that even though a verdict may be speculative, that verdict, rendered in the absence of evidence of damage or based upon inadequate instruction, may stand unless the reviewing court is able to determine that the verdict is excessive as a matter of law. Such a suggestion is wholly untenable and must be rejected. *Myers v. Town of Harrison*, 438 F.2d 293, 298-300 (2d Cir. 1971).

Respondent apparently concedes that *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540 (3rd Cir. 1972), *cert. denied* 409 U.S. 879 (Oct. 10, 1972), was correctly decided

and that corrective action was needed in that case.[1] Yet, there is not the slightest distinction to be made between *Ballantine* and the instant case with respect to the adequacy of the evidence and instructions on present value of lost future earnings.[2]

Petitioner did not argue that had respondent introduced evidence as directed in *Ballantine* with proper instructions given to the jury as to the measure and manner of computation of damages for loss of future earning capacity, a verdict of $94,000.00 would have been, *per se*, excessive. But excessiveness *per se* is not the issue here, notwithstanding respondent's efforts to make it so.[3]

Respondent suggests without citation that no substantive rights of petitioner are abridged by the verdict in this case having been rendered in the absence of sufficient evidence and proper instructions regarding the manner in which the present value of an award of damages for loss of future earnings should be computed. He also suggests that the introduction of such evidence would have resulted in confusion of the jury, a suggestion which is unsupported in fact or law.

Respondent does not deny that the evidence on which he based his claim for damages for loss of future earnings was speculative.[4] That admission illustrates precisely petitioner's conten-

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[1] Respondent's brief p. 6, n. 3.

[2] Indeed, in the instant case the jury was provided even less guidance than was provided in *Ballantine* where the trial court provided at least a simple example of the manner in which present value is computed. *Ballantine*, 460 F.2d at 542.

[3] Respondent's suggestions at page 3 of his brief in opposition that petition did not seek remittitur or new trial on either of the grounds raised in its petition herein are erroneous. See Court of Appeals Appendix, pages 16 (instruction number 12), 19 (paragraph 13), 23-24 (paragraph 23) and 25 (paragraph 1).

[4] Respondent states at page 6 of his brief that, "No one could foretell when Duncan's injuries would end his work capability during the ensuing eleven years until age sixty-five."

tion in the courts below that the evidence was wholly insufficient to support an award of damages for the loss of future earnings in the first instance. That admission also illustrates the suitability of the instant case as a vehicle for clarifying this court's holding in *Chesapeake & O. R. Co. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916), by adopting the decision of the Third Circuit in *Ballantine*, where it stated, "We hold that once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth, if they are to act rationally and 'not upon mere conjecture and guess,' " *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540, 544 (1972).

Respondent again confuses the question of excessiveness *per se* with that of the adequacy of the evidence and instructions on which the verdict was rendered in his suggestions with respect to petitioner's contention that the trial court also erred in refusing to instruct the jury that any award of damages it might make would not be subject to income tax.

Implicit in respondent's argument is the recognition that the giving of such an instruction would tend to result in a smaller verdict, or stated conversely, that the failure to give such an instruction would tend to result in larger verdicts. Indeed, the Third Circuit has judicially noted such a tendency in its decision in *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971), *cert. denied* 405 U.S. 883 (1971).

As Chief Judge Lumbard stated in his dissenting opinion in *McWeeney v. New York, N. H. & H. R.R. Co.*, 282 F.2d 34, 40-41 (2d Cir. 1960):

> "Of course we seldom, if ever, know what factors jurors have considered in arriving at a verdict. It is hornbook law that courts will not inquire into what factors jurors have or have not considered, even mistakenly; nor will ver-

dicts be set aside even if it is established that the jurors rendered a verdict for mistaken reasons. The best we can do is to face the realities and require the trial judge to charge upon those matters regarding which misinformation by any one juror might lead the jury to give improper weight to a factor which should not be considered at all. Whatever is to be done must be done before the jury returns its verdict as it cannot be done later."

Respondent, apparently recognizing the substantial probability the verdict in this case was inflated by reason of the points raised herein, would have this Court judge the result by an excessiveness *per se* standard rather than address the issues which petitioner has raised.

CONCLUSION

Petitioner again prays that this Court issue a writ of certiorari to the Court of Appeals and that the judgment of the Court of Appeals be reversed and that court instructed to remand with instructions to the district court to grant petitioner's motion for a new trial.

Respectfully submitted

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